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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 295

HENRY ODELL CALLIS, as Guardian, and as Guardian ad Litem of DAVID MANUEL MENDEZ, an infant,

and

ODELL CALLIS, as Administrator of the Estate of ANN JANET CALLIS MENDEZ, deceased,

and

JAMES H. BATEMAN, as Administrator of the Estate of MANUEL ENRIC MENDEZ CUEVAS, deceased,

Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEE S. KREINDLER,
PAUL S. EDELMAN,
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THE LONG ISLAND RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 28, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit, printed in Appendix B hereto, is reported at 372 F. 2d 442.

Jurisdiction

The decision of the Court of Appeals was rendered on February 14, 1967 (223a).* Rehearing was denied and judgment was entered on March 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether it is proper to apply a state or Federal test of sufficiency of the evidence to withstand a motion for a directed verdict where Federal jurisdiction is based on diversity of citizenship.

2. Whether the evidence of respondent's negligence, measured by the applicable test, was sufficient to establish a *prima facie* case.

Rule, Statute and Amendment Involved

This case raises issues under Rule 50 of the Federal Rules of Civil Procedure, under the New York Wrongful Death Law and under the Seventh Amendment to the Constitution of the United States.

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* References designated "(a)" are to the Appendix to Appellants' Brief in the Court of Appeals supplemented by Proceeding in said Court.

Statement

This action was brought for the benefit of a little boy, now 8 years old who was orphaned and himself injured as the result of a collision at respondent's grade crossing between respondent's train and the car in which the boy was riding seated between his parents.

The trial was conducted before the Honorable Leo F. Rayfiel, United States District Court Judge, and a jury. Petitioners called Myron Bonis, an independent witness, who testified that he was driving his car immediately behind the car which was struck as it approached the crossing. The fatal car, according to Bonis came to a virtual halt before starting across the tracks (36a-38a). As it was straddling the tracks it was hit broadside by the front of respondent's locomotive and pushed approximately 845 feet along the tracks (39a, 147a). The train, according to respondent's engineer, had been traveling at about 65 miles per hour (162a-163a).

According to Bonis, immediately on the right at the crossing, the direction from which the train had come, there was a mound of dirt which was overgrown with weeds and definitely obstructed a view of a driver trying to look up the tracks (42a-43a, 58a, 64a). The mound and weeds were on respondent's right of way (13a, 42a). Moreover, as a driver was approaching the tracks his vision was partially obstructed by a chain link fence and then an abandoned warehouse approximately 60 feet before reaching the tracks (88a-89a). Bonis further testified that he had no recollection of hearing a signal or warning of any kind from the train as it approached the crossing (38a).

Respondent moved at the close of petitioner's case for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure. This motion was denied on the ground

that the testimony of Bonis about the mound of dirt and weeds obstructing one's vision raised an issue of fact for the jury to determine (181a). Respondent rested without offering any evidence and renewed its motion for a directed verdict. This motion was granted.

Reasons for Granting the Writ

A. Neither the District Court, in directing the verdict against petitioners, nor the Court of Appeals in affirming the order of the District Court articulated the standard used to determine the sufficiency of the evidence. As of now the applicable standard is unknown. On two occasions this Court has left open the question as to whether the sufficiency of the evidence in a diversity case is to be measured by a Federal or a state standard. *Mercer* v. *Theriot*, 377 U. S. 152 (1964); *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 444-45 (1959). In many cases, the question is moot because the standard is the same. See, e.g., *San Antonio* v. *Timko*, 368 F. 2d 983, 985 (2nd Cir. 1966). The question ascends the pedestal of importance, however, where, as here, the standards differ.

Under the federal standard the evidence must be "substantial" to require its submission to the jury. *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F. 2d 911 (2d Cir. 1962). A mere scintilla is not enough. *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930). This is also the standard in a mere personal injury case in New York. *O'Connor* v. *Pennsylvania R.R. Co.*, *supra*. Under New York's Wrongful Death Act (N. Y. Dec. Est. Law, §§ 130-134), on the other hand, "a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence." *Andersen* v. *Bee Line*, 1 N. Y. 2d 169, 172 (1956); *Wragge* v. *Lizza Asphalt Construction Co.*, 17 N. Y. 2d 313, 320 (1966); *Swensson* v. *New York, Albany Desp. Co.*, 309 N. Y. 497, 503 (1956).

New York courts have described this lesser degree of proof as "slight proof" (*Noseworthy* v. *City of New York*, 298 N. Y. 76, 80 (1948)), as a "showing . . . however slight" (*Wank* v. *Ambrosino*, 307 N. Y. 321, 323, 324 (1954)) and as "meager" (*Frate* v. *State of New York*, 245 App. Div. 442, 283 N.Y.S. 686, 689 (3rd Dept. 1935)). In a wrongful death case, therefore, under New York law the standard is that a mere scintilla of evidence of a defendant's negligence is all that is required to submit a case to the jury. Where, in a case such as this, therefore, selection of the appropriate standard may affect the substantive rights of the parties, the issue of which standard to apply should be resolved.

The need to settle this issue now becomes apparent in the face of the proliferation of divergent views in the various circuits as to the applicable standard, state or federal. *Compare, Trivette* v. *New York Life Ins. Co.*, 283 F. 2d 441 (6th Cir. 1960), *cert. denied*, 368 U. S. 838 (1961); *Rowe* v. *Pennsylvania Greyhound Lines, Inc.*, 231 F. 2d 922 (2d Cir.), *cert. denied*, 351 U. S. 984 (1956); *Cooper* v. *Brown*, 126 F. 2d 874 (3rd Cir. 1942), *with Curry* v. *Pyramid Life Ins. Co.*, 271 F. 2d 1 (8th Cir. 1959), *cert. denied*, 361 U. S. 933 (1960); *Phipps* v. *N. V. Nederlandsche Amerikaansche, S.M.*, 259 F. 2d 143 (9th Cir. 1958); *Davis Frozen Foods* v. *Norfolk Southern Ry. Co.*, 204 F. 2d 839 (4th Cir.), *cert. denied*, 346 U. S. 824 (1953).

It is submitted that the applicable test is the New York standard in that the cause of action is not one arising at common law but has been statutorily created. *Greco* v. *S. F. Kresge Co.*, 277 N. Y. 26 (1938). Embodying as it does, therefore, a state policy the entire rationale behind the statute should govern. The New York Courts have reasoned that in wrongful death cases the decedent is unavailable to relate his version of the incident, therefore, the evidence required to take his case to the jury should

be slight. *Wragge* v. *Lizza Asphalt Construction Co., supra; Andersen* v. *Bee Line, supra; Swensson* v. *New York, Albany Disp. Co., supra; Noseworthy* v. *City of New York, supra.*

B. Measured against the appropriate New York standard for death cases, the evidence was sufficient to go to the jury. There was evidence that respondent's train was speeding through the crossing where *on its property* there existed an obstruction to the vision of motorists using that crossing. There was also evidence that the approaching train had sounded no warning.

A reading of the opinion of the Court of Appeals (Appendix B) reveals that the Court rejected petitioners' contention of restricted visibility by weighing only that evidence which it considered as conflicting with petitioners' contention. The evidence referred to is the testimony of one Covello, an expert witness called by petitioners to the effect that the view from fifty feet before reaching the tracks to the tracks themselves was unobstructed. Indeed, it may have been at the time Covello first visited the scene which was two and one-half years after the incident but the testimony of Bonis was that on the day of the incident it was obstructed (77a). Moreover, the testimony of Covello was not that the view along the tracks was unlimited but rather his testimony was that certain photographs, which were respondent's exhibits, depicted an unlimited view (104a, 106a). These very photographs, however, had already been characterized by Bonis as *not* depicting the view a driver approaching the tracks would have because the photographs were taken from a height above the eye-level of a driver. The weight to be given these photographs was for the jury. *Cf., Brubeck* v. *Penn. R.R. Co.*, 346 F. 2d 238 (7th Cir. 1965).

It is petitioners' position that under the applicable criterion, the Court, on a motion for a directed verdict, could neither disregard evidence probative of petitioners' con-

tention, which it did by disregarding Bonis' testimony that the view was obstructed; nor could it weigh conflicting evidence as to whether there was restrictive visibility along the tracks, which it did by considering Covello's testimony. *Andersen* v. *Bee Line, supra.*

By departing from the applicable standard in reviewing the sufficiency of petitioners' evidence on the motion for a directed verdict, the Court deprived petitioners of their right under the Seventh Amendment of the United States Constitution to trial by jury. *Cf., Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364 (1913).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEE S. KREINDLER,
PAUL S. EDELMAN,
Counsel for Petitioners.

June 23, 1967

APPENDIX A

Rule and Amendment Involved.

Rule 50, Federal Rules of Civil Procedure

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

* * * * *

New York Decedent Estate Law

§ 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent

The executor or administrator duly appointed in this state or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such

husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

Amendment VII

In suits at common law, where the value in the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States (other?) than according to the rules of the common law.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—September Term, 1966.

(Argued December 15, 1966 Decided February 14, 1967.)

Docket No. 30349

HENRY ODELL CALLIS, as Guardian, and as Guardian *ad Litem* of DAVID MANUEL MENDEZ, an infant,

—and—

ODELL CALLIS, as Admr. of the Estate of ANN JANET CALLIS MENDEZ, deceased,

—and—

JAMES H. BATEMAN, Admr. of the Estate of MANUEL ENRIC MENDEZ CUEVAS, deceased,

Plaintiffs-Appellants,

—v.—

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeal from an order, United States District Court for the Eastern District of New York, Rayfiel, *J.*, granting defendant-appellee's motion for directed verdict and dismissing appellants' complaint. Affirmed.

MILTON G. SINCOFF, HARRY E. KREINDLER, PAUL S. EDELMAN, Kreindler & Kreindler, New York City, *for Plaintiffs-Appellants.*

WILLIAM F. MCNULTY, PAUL J. DONNELLY, JR., GEORGE M. ONKEN, Jamaica, New York, *for Defendant-Appellee.*

PER CURIAM:

This is an appeal from an order of the United States District Court for the Eastern District of New York, wherein the trial judge granted a motion for a directed verdict against appellants and dismissed their complaint. Appellants seek a remand for a new trial.

This action arises out of a railroad grade crossing accident when an automobile in which Manuel Enric Mendez Cuevas, his wife Ann Mendez, and infant son David Mendez, were traveling collided with one of appellee's trains. The accident occurred at about 4 P. M. on October 13, 1960 at a crossing maintained by the appellee on Mill Road in the town of Riverhead, Suffolk County, New York. Cuevas's car approached the crossing from the south and while on it was struck by a train proceeding from east to west. Cuevas and his wife were killed and their son was injured in the collision. The action was brought in federal court by the administrators of Manuel and Ann and the guardian of David. Jurisdiction was based on diversity of citizenship.

After plaintiffs presented their case defendant rested without producing any witnesses and moved for a directed verdict. The court granted the motion because it found no evidence of defendant's negligence requiring submission of the case to the jury. We agree with this disposition and will comment only briefly on the several claims of negligence advanced by the appellants.

Appellants tried to establish that Cuevas's view of the approaching train was obstructed by various obstacles, but their expert Covello admitted that from a point fifty feet south of the crossing to the crossing there was unobstructed, unlimited visibility to the east along the tracks. This is an ample unobstructed view for a driver who properly looks along the track to see if a train is approaching before he proceeds to cross at a grade crossing.

Another claim of negligence that appellant raises is that the train was negligently proceeding at an excessive speed. The only testimony with reference to the speed of the train was that of the engineer Edgar that the train was going about 52 miles per hour, and that of Bonis, a driver behind Cuevas, that the train was going "very fast." We find no basis from this testimony to conclude that the train might have been exceeding a normal operating speed for the crossing.

Appellants also claim defendant was negligent in failing to give the required warning of the approach of the train by sounding its whistle. The testimony relevant to this is that of the engineer Edgar who stated that he blew the whistle continuously from the whistling post 1400 feet east of the crossing until the accident occurred, and the testimony of motorist Bonis that he had no recollection of hearing a whistle or bell. The trial court concluded that Bonis's lack of any recollection at all as to this matter was so indefinite and uncertain as to have no probative value. We agree. It would seem that any finding that appellee failed to sound a warning solely on this testimony would be only speculation.

Appellants also claim that there is a proper issue for jury determination relative to the inadequacy of the warning devices at the crossing. The warning devices were those required by the New York Public Service Commission and thus were sufficient.

Additionally, plaintiffs maintain that they are entitled to a new trial because the court excluded evidence that other accidents had occurred at the crossing. Proof that these prior accidents had occurred was properly excluded because plaintiffs failed to show that those accidents occurred under conditions similar to this accident and no proper foundation for admission of the offered evidence was laid.

Affirmed.